BOHARI TAIB & ORS.

v.

PENGARAH TANAH & GALIAN SELANGOR

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
HARUN HASHIM SCJ
[SC CIVIL APPEAL NO. 01-36 OF 1990]
27 DECEMBER 1990

LAND LAW: *Alienation of land to farmers who had been on land for a long time - Temporary occupation licence (TOL) issued for 3 years - Expiry of TOL - Titles not issued as promised by State Government - Whether occupation lawful - Continued consent - Bare licensees or squatters - Implied or expressed consent.*

CIVIL PROCEDURE: *Claim for recovery and possession of land - Serious issues to be tried - Affidavit evidence not sufficient - Entry lawful - Proper procedure - Rules of the High Court 1980, O. 89.*

The said lands, Lots 3806 to 4522 have been occupied by the appellants and their forefathers who had been pioneer settlers of this agricultural land. Between 1971 and 1976, the appellants alleged that they applied to the state authority for titles to the said land. On 4 September 1980, the Selangor State Executive Council approved the alienation of the land of the appellants who were also assured by a member of the State Executive Council that the appellants would be given titles to the said land. For the 1st 3 years, temporary occupation licences (TOL) were issued after which separate titles were to be issued. The respondent claimed, under O. 89 of the Rules of the High Court (RHC), 1980, for recovery of possession of the said lands.

After the expiry of the TOL period in 1984, the appellants contended that they had acquired a legal right or expectation to be issued with land titles. Therefore, the appellants argued that the respondent is not entitled, under O. 89, to evict them as trespassers without payment of compensation. The appellants claim that they are either licensees holding over or lawful occupiers of state land with the continued consent of State Executive Council under the approved alienation; as such O. 89 of the RHC is not the proper procedure to be adopted. Instead, proceedings should have been instituted by writ.

The trial Judge granted the respondent's order of possession and also ordered that the writ and statement of claim filed by two farmers be consolidated with the O. 89 proceedings and be struck out. In the writ action, A and B, on behalf of themselves and others in occupation of the said land, had sought a declaration that they were entitled in law and equity to possession of the said land.

Held:

[1] The appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the State Government by virtue of the 1980 alienation already approved prior to the TOLs.

[2] (a) The alleged continued consent of the State Government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried;

(b) there are issues to be tried in this case which are not suitable to be decided by affidavit evidence; this case should not be dealt with summarily under O. 89.

[3] (a) In allowing the respondent's application under O. 89, the learned Judge had relied almost entirely on the *Lesco* case and the *Sidek* case; however, these two decisions of the Federal Court are not authorities for the scope and application of O. 89;

(b) for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over;

(c) it may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different;

(d) on the facts, there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code;

(e) the respondent has failed to comply with r. 3(b) of O. 89 by its failure to disclose fully in its affidavit-in-support, the whole relevant circumstances how the lands came to be occupied by the appellants both before and after the 3 year period of TOL, and why the approval of EXCO to the alienation of the lands to the farmers as contained in the collector's letter of 25 October 1980, was neither exhibited not implemented;

(f) where the entry to the land is lawful, and where there are triable issues, O. 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

[Appeal allowed.]

Cases referred to:

Government of the State of Negeri Sembilan & Anor. v. Yap Chong Lan & 12 Ors. [1984] 1 CLJ (Rep) 144

McPhail v. Persons Names Unknown [1973] 3 All ER 393

Sidek bin Hj. Muhamad and 461 Ors. v. Government of the State of Perak and Ors. [1982] CLJ (Rep) 321

Legislation referred to:

National Land Code 1965, s. 42

Rules of the High Court 1980, O. 13, O. 14, O. 89 rr. (1), (2), (3), 3(b)

Other source referred to:

1988 White Book (Vol. 1) pp. 1470-1

For the appellants - G.S. Nijar (Mohideen Abdul Kadeer & Meenakshi Raman with him); M/s. Meena, Thayalan & Partners

For the respondent - Hishamudin, Legal Adviser

JUDGMENT

Mohd. Azmi SCJ:

This appeal involves the interpretation of O. 89 Rules of the High Court 1980 as relates the propriety of its application to the facts and circumstances of the respondent's claim for recovery of possession of state land from the appellants in Sabak Bernam in the state of Selangor. Apparently, the parcels of land were originally intended to be alienated to the appellants and other landless farmers who have been occupying and farming them for years, but the respondent now thought it fit to hand them over to the Federal Land Consolidation and Rehabilitation Authority (FELCRA), a statutory body, whose main function currently we are told is to rehabilitate abandoned agricultural land. The main issue before us is whether on the facts, the respondent ought to have sued the appellants by writ instead of by the summary procedure under O. 89.

It is common ground that by originating summons dated 17 January 1990, the respondent applied under O. 89 for an order to recover possession of the whole of the land identified as Lots 3806 to 4522 against the six appellants and other persons in occupation of the state land at Mukim Sungai Panjang in the district of Sabak Bernam. The body of the summons states that the grounds for application is that "the plaintiff is entitled to possession and the defendants named herein and all those other persons in occupation are in occupation without licence or consent." The fundamental issue is therefore the absence of either licence or consent.

The learned Judge not only summarily granted the respondent order of possession but also made a consequential order whereby he ordered that the writ of summons and statement of claim filed by two of the aggrieved farmers (not the appellants) on 20 March 1990 *vide* Shah Alam High Court Suit No. 21-226 of 1990 be consolidated with the O. 89 proceedings, and be struck out forthwith. In that writ action, one Mokhtar bin Jaafar, a deponent in the O. 89 proceedings and one Mat Jani bin Ali Gasan have sued the Pengarah Tanah dan Galian Selangor on behalf of themselves and all other persons in occupation of portions of the land in dispute, for a declaration that they are entitled in law and in equity to be in possession of the said land, and for other consequential orders. In making the order that he did, the learned Judge after referring to two leading authorities of the Federal Court in *Government of the State of Negeri Sembilan & Anor. v. Yap Chong Lan and 12 Ors.* [1984] 1 CLJ (Rep) 144 (the *Lesco* case) and *Sidek bin Hj. Muhamad & 461 Ors. v. Government of the State of Perak & Ors.* [1982] CLJ (Rep) 321, took a swipe at Counsel for the appellants in this pernicious term:

> 39. When the defences taken in this case were so absolutely sterile one needs to ask why they were solemnly put forward by officers of this Court whose duty is to advise their clients on what the law is and not what in their or the clients opinion it ought to be. Failure to give advance notice of legal points intended to be taken may be minor misdemeanours not in the best of the traditions of the bar. But filing legal proceedings for relief where it is obvious that none exists is quite something else.

Be that as it may, we cannot help but are amazed at the long history of permitted occupation of Lots 3806 to 4522 by the farmers and at the dispute on approved alienation by the state authority to them under the National Land Code. From the record of appeal there is hardly any question that the forefathers of the appellants and the other unnamed occupiers or some of them at least were pioneer settlers of the agricultural land in dispute. The land scheme comprises of 717 lots each measuring three acres in area, but in this appeal we are concerned only with 515 of them, including the ones occupied by the appellants. Under what

circumstances, the land authority has debilitatingly acquiesced or consented to this pioneering activities, we are not at all clear. But between 1971 and 1976, the appellants alleged that they and the others did make application to the state authority for titles to the said land. There is some evidence by affidavit and documentary exhibits to show that on or about 4 September 1980, the Selangor State Executive Council, no doubt acting under the National Land Code, had approved the alienation of the said land to the appellants and the other selected settlers, and on 1 November 1980, one Dato' Haji Kamarulzaman bin Haji Ahmad, the then member of State Executive Council had personally confirmed the approval and assured them that they would be given titles to the said land. It would appear that the policy of the State Government was to ensure that only genuine and landless farmers would be given the lands, and for this purpose notwithstanding the approved alienation, administrative conditions which we think are both fair and reasonable were imposed by the respondent whereby for the first three years, only temporary occupation licences would be granted to the farmers, after which separate titles to the land would be issued provided they continued to cultivate the said land and remained with landless status. It is the contention of the appellants that after the expiry of the TOL period in 1984, since they and the other farmers have satisfied the post alienation conditions administratively imposed by the respondent, they have acquired legal right or expectation to be issued with land titles, and as such the respondent who is suing on behalf of the State Government is not entitled in law to shoo them away summarily under O. 89 as trespassers pure and simple without even any right to compensation relating to their eviction from the land. They claim that they are not squatters of state land in the popular and normal sense, but are either licensees holding over or lawful occupiers of state land with the continued consent of State Executive Council under the approved alienation. If their occupation of the land is with the continuing consent, implied or expressed, of the state authority, then notwithstanding the expiry of their TOLs, O. 89 is not the proper procedure to be adopted.

Rules (1), (2) and (3) of O. 89 which came into force on 30 March 1984 provide:

> (1) Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.
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> (2) The originating summons shall be in Form No. 8A and no acknowledgment of service shall be required.
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> (3) The plaintiff shall file in support of the originating summons an affidavit stating:
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> (a) his interest in the land;
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> (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
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> (c) that he does not know the name of any person occupying the land who is not named in the summons.

Mr. G.S. Nijar, Counsel for the appellants has reminded us that O. 89 is a reproduction of English O. 113 and has referred to the following commentary in the *1988 White Book* (Vol. 1) at pp. 1470-1:

> For the particular circumstances and remedy described in r. 1, this order provides a somewhat exceptional procedure, which is an amalgam of other procedures, e.g., procedure by *ex parte* originating summons, default procedures and the procedure for summary judgement under

> O. 14. Its machinery is summary, simple and speedy, i.e., it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action *in rem*, since the action would relate to the recovery of the *res* without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O. 13 and O. 14, this order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e., where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the State Government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that TOLs and therefore consent were given only up to 1983. After that no TOL was issued to indicate absence of consent. In our view, the alleged continued consent of the State Government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of the TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s. 42 of the National Land Code, and pending issue of titles under s. 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p. 95 of appeal record reads:

> Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.

We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O. 89. Counsel for the appellants has rightly referred to the position of licensees holding over as distinct from squatters in the following judgment of Lawton J in *McPhail v. Persons Names Unknown* [1973] 3 AER 393 at 401:

> It follows, in my judgment, that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the Court to stay execution in such cases.

In allowing the respondent's application under O. 89, the learned Judge had relied almost entirely on *Lesco* case and *Sidek* case. With respect, these two decisions of the Federal Court are no authorities for the scope and application of O. 89. In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent

of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code. In this case, we also find that the respondent has failed to comply with r. 3(b) of O. 89 by its failure to disclose fully in its affidavit-in-support, the whole relevant circumstances how the lands came to be occupied by the appellants both before and after the 3 year period of TOL, and why the approval of EXCO to the alienation of the lands to the farmers as contained in the Collector's letter of 25 October 1980, was neither exhibited not implemented.

Finally, it has come to our knowledge that recently in *Mohd. Rawi bin Yaacob v. Federal Land Development Authority*, (SCCA No. 02-311 of 1989) another panel of this Court, (Abdul Hamid LP, Gunn Chit Tuan SCJ and Mohd. Jemuri SCJ) had in allowing an appeal held that where the entry to the land is lawful, and where there are triable issues, O. 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

We have therefore allowed this appeal with costs, by setting aside the order of the High Court, including the striking out order of Shah Alam High Court Suit No. 21-226 of 1990, with liberty to the respondent to proceed afresh with the claim for possession by writ.

Also found at [1991] 1 CLJ 647